Syarikat Bekalan Air Selangor Sdn Bhd v Selangor State Government (Government of Malaysia, third party)

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-1478–09 OF 2011
ABU BAKAR JAIS JC
3 OCTOBER 2013

Civil Procedure — Amendment — Pleadings — Amendment of statement of defence to change name of party — Amendment to state that plaintiff had no locus standi to bring action — Agreement to amend recorded by court — Discovery of involvement of different party altogether — Application to re-amend amended defence — Whether defence could be amended at any stage of proceedings — Whether plaintiff prejudiced

In the present suit, the plaintiff sued the defendant based on a concession agreement ('CA') where it was claimed, inter alia, that the defendant failed to pay compensation due under the CA. The defendant wanted to amend the amended defence to change the name of the party and this was consented by the plaintiff. The court then recorded the agreement of the parties and allowed the amendment which sought to state that the plaintiff had no locus standi to bring the action as its rights, benefits and interests were all assigned to Pengurusan Aset Air Bhd ('PAAB'). With the agreement of the parties, the amendment was duly filed and the amended defence reflected the same. While cross-examining the plaintiff's witness during trial, it was informed that the assignment was not for PAAB but for Commerce International Merchants Bankers Berhad ('CIMB'). The defendant argued that having realised that the assignment was for the benefit of a different party altogether, the defendant sought to reamend the amended defence. The defendant contended that the amended defence could be amended at any stage of the proceedings, subject to the discretion of the court; there was no prejudice to the plaintiff for the application to amend the amended defence and even if there was, it could be compensated by costs; the amendment proposed was to clarify the position or standing of the plaintiff only; the plaintiff did not have a cause of action, due to insufficiency of the plaintiff's title.

Held, allowing the application with costs of RM5,000:

(1) The court could not agree that the defendant could object on the standing of the plaintiff much earlier before the trial. There was no evidence to suggest the defendant had the information on the standing of the plaintiff during the early stage when the case was first initiated by the plaintiff. The assertion by the plaintiff that the defendant knew all the

while or could have known that the assignment was for CIMB was incorrect as the documents referred by the plaintiff did not reflect the same. Nowhere in the documents referred by the plaintiff, could the court see that assignment was indeed made by the plaintiff in favour of CIMB (see paras 41–43).

(2) The action taken by the plaintiff not to object when the amendment was made the first time to indicate assignment was for PAAB, worked against the plaintiff for them to say they are prejudiced by the amendment sought now. There was no material difference between the amendment already consented and the amendment sought now as the difference was only on the specific party having the alleged benefit of the assignment (see paras 44–45).

(3) There was no necessity to determine the capacity of the plaintiff to sue, contrary to what was implied by the defendant. That could only happen after the application was made by the defendant, if any, to strike out the plaintiff's writ and statement of claim for the reason that the plaintiff had no locus standing to bring this action to court or to apply under O 14A of the Rules of Court 2012 for disposal of case on point of law (see para 54).

(4) The amendment applied would not change the character of the defence as it only clarified the party having the assignment but maintaining the fact that the plaintiff had no standing to bring the action because of the assignment. After all, the plaintiff did consent to the amendment indicating the plaintiff had assigned its rights, benefits and interests when the first amendment was made. There was no new defence sought to be introduced by the defendant by the request for amendment to the amended defence. The application was allowed to do justice to all parties, not just the plaintiff and defendant but to the third party as well and for all relevant issues to be presented before the court in order for a fair decision to be delivered (see paras 61–63).

[Bahasa Malaysia summary

Dalam saman ini, plaintif mendakwa defendan berdasarkan kepada perjanjian konsesi ('PK') yang mana ia didakwa, antara lain, bahawa defendan gagal membayar pampasan sewajarnya di bawah PK. Defendan hendak meminda pembelaan dipinda untuk menukar nama parti dan ini telah dipersetujui oleh plaintif. Mahkamah kemudian merekodkan persetujuan pihak-pihak dan membenarkan pindaan yang bertujuan menyatakan bahawa plaintif tidak mempunyai locus standi untuk membawa tindakan itu disebabkan semua hak, faedah dan kepentingan telah diberikan kepada Pengurusan Aset Air Bhd ('PAAB'). Dengan persetujuan pihak-pihak, pindaan tersebut telah difailkan dan pertahanan yang dipinda menunjukkan yang sama. Semasa pemeriksaan balas saksi plaintif sewaktu perbicaraan, ia telah memaklumkan bahawa

penyerahhakan bukan untuk PAAB tetapi untuk Commerce International Merchants Bank Bhd ('CIMB'). Defendan berhujah bahawa setelah menyedari bahawa penyerahhakan itu untuk faedah parti yang berbeza, defendan meminta untuk meminda semula pertahanan dipinda. Defendan berhujah bahawa pembelaan yang dipinda boleh dipinda di mana-mana peringkat prosiding itu, tertakluk kepada budi bicara mahkamah; tiada prejudis kepada plaintif bagi permohonan untuk meminda pembelaan yang dipinda dan sekiranya ada, ia boleh diimbangi oleh kos; pindaan yang dicadangkan adalah untuk menjelaskan kedudukan atau pendirian plaintif sahaja; plaintif tidak mempunyai kausa tindakan, kerana kekurangan surat ikatan hak milik plaintif.

Diputuskan, membenarkan permohonan dengan kos sebanyak RM5,000:

(1) Mahkamah tidak boleh bersetuju bahawa defendan boleh membantah kedudukan plaintif lebih awal sebelum perbicaraan. Tiada bukti yang menunjukkan defendan mempunyai maklumat mengenai kedudukan plaintif pada peringkat awal apabila kes itu telah dimulakan oleh plaintif. Dakwaan plaintif bahawa defendan mengetahui selama ini atau mempunyai pengetahuan bahawa penyerahhakan adalah untuk CIMB adalah tidak betul kerana dokumen yang dirujuk oleh plaintif tidak mencerminkan yang sama. Tiada di mana-mana di dalam dokumen yang dirujuk oleh plaintif, membolehkan mahkamah melihat penyerahhakan sememangnya dibuat oleh plaintif di atas nama CIMB (lihat perenggan 41–43).

(2) Tindakan yang diambil oleh plaintif untuk tidak membantah semasa pindaan itu dibuat kali pertama untuk menunjukkkan penyerahhakan adalah untuk PAAB, berjaya menentang plaintif bagi mereka untuk mengatakan mereka terjejas kerana pindaan yang diminta sekarang. Tiada perbezaan yang ketara antara pindaan yang telah dipersetujui dan pindaan yang diminta sekarang kerana perbezaan hanya kepada pihak yang tertentu mempunyai manfaat yang dikatakan penyerahhakan tersebut (lihat perenggan 44–45).

(3) Tidak ada keperluan untuk menentukan keupayaan plaintif untuk mendakwa, bertentangan dengan apa yang dinyatakan oleh defendan. Itu hanya boleh berlaku selepas permohonan itu dibuat oleh defendan, jika ada, untuk membatalkan writ dan pernyataan tuntutan plaintif bagi alasan bahawa plaintif tidak mempunyai kedudukan locus untuk membawa tindakan ini ke mahkamah atau untuk memohon di bawah A 14A Kaedah-Kaedah Mahkamah 2012 bagi pelupusan kes mengenai perkara undang-undang (lihat perenggan 54).

(4) Pindaan terpakai tidak akan mengubah watak pembelaan kerana ia hanya menjelaskan pihak yang mempunyai penyerahhakan tetapi mengekalkan hakikat bahawa plaintif tidak mempunyai kedudukan untuk mengambil tindakan kerana penyerahhakan tersebut. Lagipun, plaintif telah

mempersetujui pindaan yang menunjukkan plaintif telah menyerahkan hak, faedah dan kepentingan semasa pindaan yang pertama dibuat. Tidak ada pembelaan baru yang hendak dikemukakan oleh defendan dengan permintaan untuk pindaan kepada pembelaan dipinda itu. Permohonan itu dibenarkan untuk berlaku adil kepada semua pihak, bukan hanya plaintif dan defendan tetapi kepada pihak ketiga dan juga dan untuk semua isu-isu berkaitan yang akan dibentangkan di hadapan mahkamah bagi membolehkan keputusan yang adil dicapai (lihat perenggan 61–63).]

Notes

For cases on pleadings, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 660–663.

Cases referred to

Bumiputra-Commerce Bank Bhd & Ors v Bumi Warna Indah Sdn Bhd [2004] MLJU 529; [2004] 4 CLJ 825, HC (refd)

CHS, Re [1997] 3 MLJ 152, HC (refd)

Hiroto Watanabe v Law Yen Yen & Anor [2012] 8 MLJ 202, HC (refd)

John Trawe Kuda v Adtec Sdn Bhd [1996] 5 MLJ 335, HC (refd)

Kapoor v National Westminster Bank plc and another [2012] 1 All ER 1201, CA (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213, FC (folld)

YB Datuk Dr Soon Choon Teck v YB Datuk Robert Lau Hoi Chew & Ors [2009] 3 MLJ 785, CA (refd)

Legislation referred to

Rules of Court 2012 O 14A

Gopal Sri Ram (Lua Ai Siew and CK Lim with him) (Soo Thien Ming & Nasrah) for the plaintiff.

Malik Imtiaz Sarwar (Fahda Nur Ahmad Kamarwith him) (Fahda Nur & Yusmadi) for the defendant.

Rahdi Abas (Habibah Harun with him) (Federal Counsel, Attorney General's Chambers) for the third party.

Abu Bakar Jais JC:

THE BACKGROUND

[1] This is a case where at this stage this court is only concerned with the application by the defendant, set out in encl 168, in the midst of trial for leave to amend the amended defence.

[2] Therefore this court will not elaborate on the details of the claim in this case except to say that this is a case where the plaintiff sued the defendant based on a concession agreement ('CA') dated 15 December 2004 where the statement of claim asserts among others that the defendant failed to pay compensation due under the CA.

[3] What is more important to note is that the defendant now wants to amend the amended defence to change the name of the party according to them that has the benefit of the assignment having been granted the same by the plaintiff.

THE MATERIAL FACTS

[4] On 23 August 2013 the plaintiff consented to the amendment to para 1 of the defence. This court recorded the agreement of the parties and allowed the amendment requested. With the amendment, the additional sentence to the amended defence reads:

> Defendan menyatakan bahawa memandangkan Plaintif telah menyerahkan hakkan kesemua hak, keistimewaan dan kepentingannya Plaintif tidak ada hak untuk membawa prosiding ini.

[5] The English translation provided for the same reads:

> The defendant avers that in view of the plaintiff having assigned all its rights, benefits and interests, plaintiff does not have standing to bring the proceedings herein.

[6] The consent was given subject to the defendant providing the plaintiff with particulars to the amendment.

[7] The particulars were narrated in a letter sent by the defendant to the plaintiff on the same date as when the amendment was allowed and the particulars read:

> The plaintiff had effected an assignment in favour of Pengurusan Asset Air Berhad (PAAB) in respect of matters that include, but not limited to the following:
>
> (a) its rights, benefits and interests under the Concession Agreement;
>
> (b) its rights, benefits, and interests under bonds issued in favour of the plaintiff, and/or
>
> (c) its rights, benefits, and interests of other properties assigned by the plaintiff to Pengurusan Aset Air Berhad.

[8] These particulars to the amendment of para 1 of the defence are agreed by both parties to be read as part of the pleadings.

[9] In essence and effect the amendment sought to state that the plaintiff has no locus standi to bring the action as its rights, benefits and interests are all assigned to Pengurusan Aset Air Berhad ('PAAB').

[10] With the agreement of the parties the amendment was duly filed and the amended defence reflects the same.

[11] On 3 September 2013, the second day of trial, the defendant while cross-examining the plaintiff's witness, Thein Kwee Swee was told that the assignment was not for PAAB but for Commerce International Merchants Bankers Berhad ('CIMB').

[12] Having realised that the assignment was for the benefit of a different party altogether, the defendant sought to re-amend para 1 of the amended defence, this time para 1 of the amended defence is sought to include para 1.1 which reads:

> Selanjutnya dan secara alternatifnya, Defendan menyatakan bahawa plaintiff telah menyerah hakkan kesemua hak, milikan, keistimewaan dan kepetingannya di dalam Perjanjian Konsesi kepada CIMB Bank Berhad atau CIMB Investment Bank Berhad atau entity lain di dalam kumpulan syarikat CIMB dan akibatnya Plaintif tidak layak untuk memulakan, membawa tindakan ini.

[13] The English translation reads:

> 'Further, or in the alternative, the defendant avers that the plaintiff has assigned its rights, title, benefit and interests in the Concession Agreement to CIMB Bank Berhad or another entity within the CIMB group of companies, as a consequence of which it is not competent to have instituted or maintain the action herein'

[14] This is the application before this court now.

THE DEFENDANT'S SUBMISSION

[15] In support of the application for amendment to the amended defence as stated, the defendant's gist of arguments is narrated below.

[16] The defendant contended that the pleadings, in this case, the amended defence could be amended at any stage of the proceedings, subject to the discretion of this court.

[17] There is no prejudice to the plaintiff for the application to amend the amended defence and even if there is prejudice, it can be compensated by costs.

[18] The amendment proposed is to clarify the position or standing of the plaintiff only, by stating the specific party having the assignment.

[19] More to the point, the defendant also argued that the plaintiff has no standing to maintain the action as it has assigned its rights to CIMB.

[20] The plaintiff according to the defendant also does not have a cause of action, due to insufficiency of the plaintiff's title. The plaintiff must join the assignee in this action as the plaintiff has assigned its rights.

[21] The defendant also submitted, there is also abused of process by the plaintiff as it knew that the right to sue belongs to CIMB.

[22] The application to amend now cannot be a surprise to the plaintiff as it knew of the defendant's reservation on its standing since 17 June 2013.

[23] There was bad faith on the part of the plaintiff to object now as it did not object when the amendment was made on 23 August 2013 where it was asserted that the assignment was for the benefit of PAAB.

THE PLAINTIFF'S SUBMISSION

[24] The gist of the plaintiff's rebuttal is narrated below.

[25] In the affidavit in reply of the plaintiff opposing the application for amendment to the amended defence, the plaintiff said the history of this case needs to be considered to note that the defendant had failed to raise the issue of the plaintiff's standing in bringing this action to court.

[26] When the defendant filed its defence on 14 November 2011, the standing of the plaintiff in initiating the action was never questioned. Neither was the issue raised in the affidavits of the defendant when this case was first initiated by way of originating summons.

[27] The plaintiff argued that the defendant should be aware of the plaintiff's standing since it has two representatives in the plaintiff's board of directors (BOD).

[28] The defendant is aware of the alleged assignment to CIMB and should have resorted for discovery of the same much earlier in the proceedings.

[29] The assignment was also earlier depicted in the Malaysian Rating Corporation Bhd Report ('MARC') dated May 2005 and in discussion as seen in the plaintiff's BOD's meeting on 30 June 2005.

[30] If the amendment is allowed, it would prejudice the plaintiff, having regard among others to the long delayed trial of the case.

[31] The amendment also if permitted would change the character of the defence by the defendant.

THE FINDINGS OF THIS COURT

[32] Some judicial pronouncements on the law regarding amendment to pleadings would be appropriate to be highlighted here before the facts of the present application are considered for the findings of this court.

[33] The cases of *John Trawe Kuda v Adtec Sdn Bhd* [1996] 5 MLJ 335, *Re CHS* [1997] 3 MLJ 152 and *Hiroto Watanabe v Law Yen Yen & Anor* [2012] 8 MLJ 202 all say amendments may be allowed at any stage of the proceedings as long as no prejudice is occasioned that cannot be compensated by cost.

[34] As to the issue of delay in requesting for amendment, the Court of Appeal in *YB Datuk Dr Soon Choon Teck v YB Datuk Robert Lau Hoi Chew & Ors* [2009] 3 MLJ 785 held:

> It is a well settled principle that an amendment ought in general be allowed even if it comes late, if it is necessary to do justice between the parties, so long any hardship done thereby can be compensated in money (per Lord Denning in *Associated Leisure Ltd (Photographic Equipment Co Ltd) v Associated Newspaper Ltd* [1970] 2 QB 450 at p 455). A similar view was expressed by Abdul Malik Ishak J (as he then was) in the case of *Ultra Dimension Sdn Bhd v Sepadan Tuah Sdn Bhd, Genesis The As Agency Sdn Bhd (Third Party)* [2000] 6 CLJ 548, where he quoted the passage from the judgment of Brett MR in *Clarapede v Commercial Union Association* (1883) 32 WR 263, as follows:
>
> > However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs.

[35] In *Bumiputra-Commerce Bank Bhd & Ors v Bumi Warna Indah Sdn Bhd* [2004] MLJU 529; [2004] 4 CLJ 825, Abdul Malik Ishak J (as he then was) said;

A The guiding principle of cardinal importance is that amendments ought to be made for the purpose of determining the real question in controversy or of correcting any defect or error in the proceedings. The object of the court is to decide the rights of the parties, and not to punish them for the mistakes they make in the conduct of their cases. There is no error or mistake (unless it is one involving fraud or deception) that the court ought not to correct, if it can be done without injustice to the other party. Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy. Amendments are not regarded as a matter of favour or grace but of right.

[36] When it comes to applications for amendment of the pleadings, there is no reason to depart from the principles laid down as far back as 1983 by our very own Federal Court in the oft-quoted case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213.

[37] The three principles explained in that case by the late Mohamed Azmi FJ (as he then was) are:

(a) the amendment must be bona-fide;

(b) the prejudice caused can be compensated by costs; and

(c) the amendment would not change the character of the case of the party seeking the amendment.

[38] On the first principle then, is the amendment sought bona fide in the present case before this court?

[39] This court is of the finding, that question must be answered in the affirmative for several reasons.

[40] First, it is only when the plaintiff's witness was cross-examined by counsel for the defendant in the midst of trial was it discovered that the assignment was in fact for CIMB and not PAAB.

[41] This court also could not agree with the submission by the plaintiff that the defendant could object on the standing of the plaintiff much earlier before the trial. There is no evidence to suggest the defendant had the information on the standing of the plaintiff during the early stage when the case was first initiated by the plaintiff.

[42] Second, the assertion by the plaintiff that the defendant knew all the while or could have know that the assignment was for CIMB is incorrect as the documents referred by the plaintiff do not reflect the same.

[43] Likewise, nowhere in the documents including the minutes of the plaintiff's BOD's meetings, referred by the plaintiff, could this court see that assignment was indeed made by the plaintiff in favour of CIMB.

[44] Third, the action taken by the plaintiff not to object when the amendment was made the first time to indicate assignment was for PAAB, works against the plaintiff for them to say they are prejudiced by the amendment sought now.

[45] On this point, this court finds there is no material difference between the amendment already consented and the amendment sought now as the difference is only on the specific party having the alleged benefit of the assignment.

[46] In this regard, in both the amendments, earlier made and now sought, the defendant's case is still that the plaintiff does not have the standing to initiate or maintain the court action.

[47] On the second principle, whether the prejudice caused to the plaintiff can be compensated with costs, this court will have to decide whether in the first place there is such prejudice. Only after this court find there is indeed the element of prejudice, will this court decide whether the plaintiff could be compensated with costs.

[48] In the present case before this court, it is submitted by the counsel of the plaintiff that in the event the amendment requested is allowed, the plaintiff will need to amend the writ and statement of claim to reflect the fact that action is taken by the plaintiff as assignor together with CIMB as assignee or to the effect that action is consented by CIMB to be taken by the plaintiff as trustee against the defendant.

[49] This is apparently taken from the case of *Kapoor v National Westminster Bank plc and another* [2012] 1 All ER 1201 which decided that assignor must join the assignee or assignee must consent for assignor as trustee to take court actions.

[50] This submission coming from counsel of the plaintiff himself is taken by this court to mean that all is not lost on the part of the plaintiff.

[51] The plaintiff is still able to pursue its case even if the amendment sought by the defendant is allowed and correspondingly, amendment to the writ and statement of claim also is allowed.

[52] Of course that application for amendment by the plaintiff if any must be filed for this court to consider.

[53] Therefore this court would not agree that the plaintiff will be prejudiced if the amendment is allowed for the defendant.

[54] At this stage is it also the finding of this court there is no necessity to determine the capacity of the plaintiff to sue, contrary to what is implied by the defendant. That could only happen after the application is made by the defendant, if any to strike out the plaintiff writ and statement of claim for the reason the plaintiff has no locus standing to bring this action to court or to apply under O 14A of the Rules of Court 2012 for disposal of case on point of law.

[55] Though not judging it at this stage, even then, the application by the defendant for striking out or disposal of case on point of law, would most likely be futile if amendment is allowed for the plaintiff to reflect the interests of CIMB in the writ and statement of claim.

[56] This court could also decide only at the end of trial having regard to the answer that might be given by the plaintiff on the allegation that it has no standing to sue.

[57] As these variables are foreseeable but real, the plaintiff also cannot be prejudiced by the amendment sought.

[58] Assuming for a moment this court is wrong to say the plaintiff is not prejudiced, the second stage of inquiry to the second principle must then be considered. Could the prejudice be compensated by costs?

[59] Here this court would agree that the prejudice, if any, can be compensated by costs. In this case too, it is the prayer of the defendant that the defendant is to bear the costs for the application to amend as requested.

[60] Also this court, in all fairness could not say that the cause for the delay in the trial of this case lies solely on the defendant. There are many reasons for the delay of the trial of this case, among others it was occasioned by the need to withdraw the suit and file it again upon the direction of the court.

[61] On the last principle set out by *Yamaha Motor*, this court finds that the amendment applied would not change the character of the defence as it only clarifies the party having the assignment but maintaining the fact that the plaintiff has no standing to bring the action because of the assignment. After

all, the plaintiff did consent to the amendment indicating the plaintiff had assigned it rights, benefits and interests when the first amendment was made.

[62] There is no new defence sought to be introduced by the defendant by the request for amendment to the amended defence. The defence on the standing of the plaintiff was already in when the amendment was made to the defence after consent was given by the plaintiff before the trial and recorded in this court on 23 August 2013.

[63] Last but not least, this application is allowed to do justice to all parties, not just the plaintiff and defendant but to the third party as well and for all relevant issues to be presented before this court in order for a fair decision to be delivered in this case.

THE DECISION

[64] Based on the foregoing, the amendment applied for is allowed with costs of RM5,000 to the plaintiff.

Application allowed with costs of RM5,000.

Reported by Afiq Mohamad Noor